

# State Immunity: Reassessing the Boundaries of Judicial Autonomy in Hong Kong

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Ever since the establishment of “one country, two systems” in Hong Kong, there has been continuing controversy pertaining to the boundaries of judicial autonomy in Hong Kong vis-à-vis the People’s Republic of China (“China”). In particular, the definition of “act of state” and “foreign affair” – matters that are excluded from the jurisdiction of courts in Hong Kong – has been unclear. In *FG Hemisphere v Democratic Republic of Congo*<sup>1</sup> (“Congo”), a rare opportunity in Hong Kong’s history to explore this issue, Hong Kong’s Court of Final Appeal (“CFA”) ruled by a 3:2 majority that the decision as to what the law on state immunity is constitutes a foreign affair, and the Chinese authorities’ determination on such an issue is an act of state. This article argues that the ruling has to some extent clarified the limits of judicial autonomy in Hong Kong, but failed to secure the maximum boundaries of autonomy permissible under its constitution, the Basic Law.

## Boundaries of judicial autonomy

The Basic Law enshrines that Hong Kong practises the common law legal system, which is markedly different from China’s Socialist legal system.<sup>2</sup> The key to this co-existence of systems lies in giving courts in Hong Kong the final power of adjudication over all matters except acts of state (art.19), which include foreign affairs – an area that falls within the exclusive responsibility of the Chinese authorities (art.13(1)). Beijing’s Standing Committee of the National People’s Congress (“NPCSC”) has plenary powers of interpreting the Basic Law and authorises courts in Hong Kong to interpret the same during adjudication (art.158(1)-(2)). If the CFA needs to *interpret* an excluded provision, i.e. a provision that concerns the responsibility of the Chinese authorities, in order to dispose of a case, it must seek a binding interpretation from the NPCSC before delivering a judgment (art.158(3)). It is

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<sup>1</sup> *Democratic Republic of Congo v FG Hemisphere Associates LLC* F.A.C.V. Nos 5, 6 & 7 of 2010 (Civil); June 8, 2011 (CFA) (“Congo”).

<sup>2</sup> Basic Law arts 5, 8, 18, 160.

established that the need to *interpret* as opposed to merely *apply* a provision only arises if the meaning of the provision in the case is arguable.<sup>3</sup>

While this may be a coherent framework, it leaves a crucial question unanswered: what is “act of state” and “foreign affair”? It is clear that the NPCSC has final powers of interpreting these jurisdiction-excluding concepts, but it is unclear how courts in Hong Kong, applying common law principles, would interpret them. Despite the NPCSC’s ultimate powers of interpretation, it is important to explore the latter question, for the following reasons.

The Basic Law gives ample space to the courts of Hong Kong to determine the boundaries of their power using the common law approach, *in the absence of prior interpretations issued by the NPCSC*. Firstly, the CFA’s interpretations of the jurisdiction-excluding concepts will determine whether it will request the NPCSC to interpret these concepts pursuant to art.158(3). It is established that if in the court’s view *clearly and unarguably* no such jurisdiction-excluding matter is involved in the case, then the case can be disposed of without the need to interpret and hence seek reference on arts 13 and 19, which are indisputably excluded provisions. This position has been affirmed by practice in every case since the handover: until *Congo*, courts in Hong Kong had never sought an interpretation of arts 13 and 19 because in their view clearly no foreign affair or act of state had ever been involved.<sup>4</sup>

Secondly, if based on its own understandings of these jurisdiction-excluding concepts the CFA decides not to seek reference, then such understandings will stand *unless and until* the NPCSC issues a contrary interpretation, because interpretations issued by the NPCSC do not affect judgments previously rendered (art.158(3)). For these reasons, the boundaries of judicial autonomy are significantly affected by how courts in Hong Kong define them. In light of this, we turn now to explore the CFA’s ruling in *Congo*, which has shed light on how it defines the excluding concepts.

### **The *Congo* case**

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<sup>3</sup> *Ng Ka Ling v Director of Immigration* [1999] 1 H.K.L.R.D. 315 (CFA), at 344; *Congo* at [84, 398, 404, 521]. Cf. the *acte clair* test in the EU, where national courts need not seek a preliminary ruling if the correct application of the relevant EU law is free from doubt.

<sup>4</sup> E.g. Courts had ruled on *refoulement*, recognition of a Taiwanese judgment, and customary international law without seeking reference on whether these matters constitute foreign affairs in the context, because in the courts’ view they clearly do not.

In this case, FG Hemisphere, a US distressed debt fund, sought to enforce two ICC awards it had bought against the Democratic Republic of Congo (“the Congo”) by garnishing certain funds in Hong Kong. These funds were payable by a consortium of Chinese enterprises to the Congo in exchange for mining rights there.

At issue was whether the Congo was immune from the courts of Hong Kong, which depends in turn on whether Hong Kong recognises sovereign immunity in all cases (“absolute immunity”) or only for non-commercial acts (“restrictive immunity”). The English State Immunity Act 1978 (“SIA”), which codified the restrictive doctrine, was extended to colonial Hong Kong, but lapsed with the handover. Since then, no new legislation (whether local or extended from China, which adopts absolute immunity) has been put in place.

The Congo, the Chinese consortium, and the Secretary for Justice who effectively represented China’s position, argued that absolute immunity applied and the Congo was immune. Three letters issued by the Chinese authorities were placed before the courts, urging that if Hong Kong courts departed from the absolute doctrine adopted by China, the latter’s foreign relations would be prejudiced.

The Court of First Instance found for the Congo, but its decision was reversed by the Court of Appeal. Amongst the range of issues put forward to the CFA, the court focused on two key points: first, whether Hong Kong may depart from the doctrine of state immunity adopted by China; secondly, whether the CFA must make a request under art.158(3) to the NPCSC to interpret arts 13 and 19, which are accepted unanimously by the court as excluded provisions, on the ground that the court needs to interpret them to dispose of the case.

In June 2011, the majority held provisionally, subject to the NPCSC’s interpretation, that Hong Kong may not depart from China’s doctrine of state immunity. The majority arrived at this conclusion through various strands of reasoning, the most crucial of which, for our purposes, is its arguments on jurisdiction: adoption of the doctrine of state immunity is a foreign affair outwith Hong Kong courts’ jurisdiction. China’s determination that Hong Kong should adopt absolute immunity is an unreviewable act of state to which the CFA was bound to give effect.<sup>5</sup> The majority further held that such a view is arguable, and for the first time invoked the reference procedure under art.158(3), requesting the NPCSC to issue an interpretation on, *inter alia*, whether the Chinese government’s determination of the applicable doctrine of immunity in Hong Kong constitutes an act of state; and whether arts 13

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<sup>5</sup> *Congo* at [239-247, 331, 352-355, 361-364], per Chan PJ, Ribeiro PJ and Mason NPJ.

and 19 require Hong Kong to adhere to China's law on state immunity.<sup>6</sup> The NPCSC subsequently issued an interpretation ("Interpretation"), answering these questions in the affirmative and in line with the majority's understanding.<sup>7</sup> The latter's provisional judgment has since been rendered final.

Contrary to the majority's view, the minority considered it clear in common law that questions about the applicable doctrine of state immunity are questions of law for the courts to decide in the absence of legislation.<sup>8</sup> It further held that since clearly no foreign affair or act of state was involved, there was no need to interpret, and thus seek reference on, arts 13 and 19.<sup>9</sup>

This article will focus on examining the court's ruling on jurisdiction. This is because firstly, the majority and minority's arguments on this issue formed the basis of their respective arguments on whether to seek reference. Secondly, as compared to the majority's decisions on other issues, its decision to oust the court's jurisdiction is likely to pose the most significant impact on judicial autonomy in Hong Kong.

### **State immunity law and foreign affair**

Whether the CFA has jurisdiction to determine the applicable law on state immunity turns on what the terms "foreign affair" and "act of state" in arts 13 and 19 mean. The CFA unanimously and rightly affirmed the well-established position that it must interpret these provisions using the common law approach, which seeks to ascertain the meaning borne by the *language* of the provisions in light of their *context* and *purpose*.<sup>10</sup>

The starting point for the CFA is therefore to ascertain what the language of the provisions means at common law. The next stage of the enquiry would be to see if such common law meaning is compatible with the legislative context of those provisions, such as other provisions of the Basic Law that also deal with the constitutional status of Hong Kong.<sup>11</sup> If the meaning of the excluding concepts at common law is incompatible with other provisions of the Basic Law, such a meaning cannot survive.<sup>12</sup> The CFA unanimously

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<sup>6</sup> *Congo* at [404-407].

<sup>7</sup> Interpretation by the NPCSC of Basic Law arts 13(1) and 19, adopted by the Standing Committee of the Eleventh National People's Congress at its 22<sup>nd</sup> Session on August 26, 2011.

<sup>8</sup> *Congo* at [85, 500], per Bokhary PJ and Mortimer NPJ.

<sup>9</sup> *Congo* at [84, 521].

<sup>10</sup> *Congo* at [310].

<sup>11</sup> *Ng Ka Ling v Director of Immigration* [1999] 1 H.K.L.R.D. 315, at [75] (CFA); *Director of Immigration v Chong Fung Yuen* [2001] 2 H.K.L.R.D. 533, s.6.3 (CFA)

<sup>12</sup> Basic Law arts 8, 160.

accepted (whether explicitly or implicitly) that in the absence of a prior interpretation issued by the NPCSC, the court's role is to assess the question of compatibility by reading the Basic Law from the perspective of a common law court.<sup>13</sup> It need not speculate whether the NPCSC will find the common law meaning of the excluding concepts compatible with the Basic Law.

If this approach were correctly applied, it would have been unequivocal that no foreign affair or act of state was involved. As the minority judges argued, it is well-established at common law that while courts do not have jurisdiction over foreign affairs and acts of state,<sup>14</sup> and are bound by certificates of *facts* of foreign policies within the peculiar cognizance of the executive, they generally do have jurisdiction over questions of municipal and international law.<sup>15</sup> The law on state immunity has been established as falling within this general rule. Hong Kong's courts have considered such law and even held in favour of restrictive immunity as far back as in 1956.<sup>16</sup> The English courts changed the law on state immunity to embrace restrictive immunity before the SIA was enacted.<sup>17</sup> Courts in many other common law jurisdictions have also ruled on the doctrine of state immunity as a question of law in the absence of legislation.<sup>18</sup> Such doctrine has never been considered at common law as a foreign affair outside the jurisdiction of courts.<sup>19</sup>

That this long-standing position should have been applied in Hong Kong is reinforced once we consider the legislative purpose and context. Article 19 itself provides that restrictions on the courts' jurisdiction are limited to those imposed before the handover. Numerous provisions in the Basic Law stipulate the continuity of the previous legal system,<sup>20</sup> as did a pre-promulgation explanation of art.19 given by the Chairman of the drafting

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<sup>13</sup> Both the majority and minority justified their views of the Basic Law with common law principles. E.g. *Congo* at [267, 310-331].

<sup>14</sup> This position was affirmed recently in *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758 (UK Court of Appeal), at [209-210].

<sup>15</sup> *Carl Zeiss Stiftung v Rayner & Keeler* [1967] 1 A.C. 853 (House of Lords); F.A. Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon Press, 1986), at pp.2-4 23, 51-54, ch.2. I say "generally", because there were exceptional cases where courts gave effect to the executive's views on questions of law that affected high acts of foreign policy. E.g. *Re Westinghouse Uranium Contract* [1978] A.C. 547; Lawrence Collins, "Foreign Relations and the Judiciary" (2002) 51 I.C.L.Q. 485, 487.

<sup>16</sup> *Midland Investment Co. Ltd v Bank of Communications* (1956) 40 H.K.L.R. 42.

<sup>17</sup> *Philippine Admiral v Wallem Shipping (Hong Kong) Ltd* [1977] A.C. 373 (Privy Council); *Trendex Trading Corp v Central Bank of Nigeria* [1977] Q.B. 529 (UK Court of Appeal); *Playa Larga v I Congreso del Partido* [1983] 1 A.C. 244 (House of Lords).

<sup>18</sup> E.g. Canada, New Zealand, South Africa, Ireland, India, Malaysia, Pakistan. See also *Congo* at [113], per Bokhary PJ.

<sup>19</sup> Cf P.J. Yap, "*Congo v FG Hemisphere: Why Absolute Immunity Should Apply but a Reference Unnecessary*" (2011) 41 *Hong Kong Law Journal* 393.

<sup>20</sup> Basic Law arts 5, 8, 18, 81.

committee.<sup>21</sup> If Hong Kong courts had jurisdiction under the previous system to decide state immunity law in the absence of legislation, continuity suggests that this should also be the case after the handover. To this the majority put forward three arguments,<sup>22</sup> all of which, I argue, do not stand up to examination.

### *Nature of sovereign immunity*

The majority argues that since the nature of sovereign immunity “concerns relations between states”, questions of immunity – be they questions of law or questions of recognition – are matters of foreign affairs; the Chinese government’s determinations of these questions constitute acts (of state) performed in the course of its relations with foreign states.<sup>23</sup>

According to this logic, all issues that concern relations between states, which would include most international law issues, would be categorically foreign affairs outside the court’s jurisdiction, and the Chinese authorities’ determinations thereof, unchallengeable acts of state.<sup>24</sup> This novel reading of the excluding concepts is radically overbroad by common law standards, according to which questions of law, even those that implicate relations between states, are generally for the courts to decide. A recent example is *Binyam Mohamed*,<sup>25</sup> where the English Court of Appeal ordered the disclosure of intelligence communication between the US and UK notwithstanding such disclosure’s potential prejudice on the future intelligence relations between the two states. Further examples are where courts determined principles of international law. The majority’s argument is ungrounded in existing doctrine.

### *Constitutional allocation of powers*

The majority’s second argument can be read as a strong or weak claim. The strong claim goes, that common law jurisprudence shows that the branch of government that has been

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<sup>21</sup> Explanation of the Draft Basic Law given to the Third Session of the Seventh National People’s Congress by Ji Pengfei, Chairman of the Drafting Committee for the Basic Law on March 28, 1990, para.17.

<sup>22</sup> These arguments overlapped with the majority’s arguments on other questions. I organised these arguments largely according to the summary of issues that the majority advanced at [264-269].

<sup>23</sup> *Congo* at [226-233, 241, 247, 265, 321, 327, 348-355].

<sup>24</sup> Tony Carty, “Why are Hong Kong Judges Keeping a Distance from International Law, and with what Consequences? Reflections on the CFA Decision in *DRC v FG Hemisphere*” (2011) 41 *Hong Kong Law Journal* 401, at 405.

<sup>25</sup> *The Queen on the application of Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 (Court of Appeal (Civil Division)).

allocated exclusive authority over foreign affairs by the constitution will be responsible for deciding the law on state immunity, in the absence of legislation.<sup>26</sup> Evidence – (a): The US constitution allocates exclusive authority over foreign affairs to the executive. Before the Foreign Sovereign Immunities Act 1976 (“FSIA”) was enacted, there was a phase in which US courts followed the executive’s suggestions on whether to grant immunity. This shows that US courts have no jurisdiction to decide the law on state immunity in the absence of legislation.<sup>27</sup> (b): In contrast, UK courts could decide the law on state immunity before the SIA was enacted because UK’s unwritten constitution was flexible enough to allow courts to decide foreign affairs.<sup>28</sup>

This argument concludes, since the Basic Law allocates foreign affairs exclusively to the Chinese authorities, only the latter can decide the law on state immunity.<sup>29</sup>

The reasoning in (b) is flawed. Powers for conducting foreign affairs are reserved exclusively for the executive in *both* the US and UK. That the allocation is done by way of an unwritten constitution in the latter makes no relevant difference.<sup>30</sup> That UK courts changed the law on state immunity is a counter-example that defeats the strong claim.

The weak claim is it is not clear in common law that courts have jurisdiction to decide the law on state immunity since in at least one jurisdiction – the US – courts were barred from doing so.<sup>31</sup> This argument ignores the position in most other common law jurisdictions, where courts have decided the law on state immunity. But this aside, even the reasoning in (a) is flawed. One must distinguish the barring of courts’ jurisdiction over certain matters, from the practice of courts *declining to exercise a jurisdiction* they possess out of deference.<sup>32</sup> The latter is a question which the court in *Congo* did not fully address.<sup>33</sup> A more accurate reading of the pre-FSIA US case law reveals that insofar as executive determinations that implicated the *law* on state immunity are concerned, the courts “spoke with one voice” out of deference and not out of lack of jurisdiction.<sup>34</sup>

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<sup>26</sup> *Congo* at [232-258, 266, 275].

<sup>27</sup> *Congo* at [234-252].

<sup>28</sup> *Congo* at [257, 276].

<sup>29</sup> *Congo* at [324-331].

<sup>30</sup> F.A. Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon Press, 1986), pp.4, 23-24.

<sup>31</sup> *Congo* at [266, 275-276, 238-247].

<sup>32</sup> Lawrence Collins, “Foreign Relations and the Judiciary” (2002) 51 I.C.L.Q. 485, at 510; P.J. Yap, “*Congo v FG Hemisphere*: Why Absolute Immunity Should Apply but a Reference Unnecessary” (2011) 41 *Hong Kong Law Journal* 393.

<sup>33</sup> The CFA discussed comity but did not expressly address whether the court should defer *if it possessed jurisdiction*. *Congo* at [279-283, 234-247, 269].

<sup>34</sup> This reading was also suggested in J.I. Charney, “Judicial Deference in Foreign Relations” (1989) 83 *Am. J. Int’l. L.* 805; C.A. Bradley, “Chevron Deference and Foreign Affairs” (2000) 86 *Virginia Law Review* 649; William Dobrovir, “A Gloss on the Tate Letter’s Restrictive Theory of Sovereign Immunity” (1968) 54 *Virginia*

Prior to FSIA, US courts had on numerous occasions determined the criteria for immunity in the absence of suggestions from the executive.<sup>35</sup> Also, the famous Tate Letter issued by the State Department to the Attorney-General notifying him of a change in the executive's policy from absolute to restrictive immunity concluded that "a shift in policy by the executive *cannot control the courts* but... the courts are *less likely* to allow a plea of sovereign immunity where the executive has declined to do so."<sup>36</sup> Finally, in *Alfred Dunhill*, the US Supreme Court enunciated restrictive immunity as "the prevailing law of this country."<sup>37</sup> All these contradict an interpretation of pre-FSIA cases as indicating a lack of jurisdiction on the part of US courts to decide the law on state immunity.

### *Hong Kong's constitutional status*

The majority's third argument is it is incompatible with Hong Kong's constitutional status under the Basic Law to allow it to determine on its own the doctrine of state immunity. Even if the common law recognised restrictive immunity and allowed Hong Kong courts to pronounce the applicable law on immunity, these common law positions have to be modified, or else they would infringe Hong Kong's post-handover status.<sup>38</sup> The majority gave two reasons why this is the case, both of which, I argue, are unconvincing.

First, the majority contended that Hong Kong is "but a local administrative region" (art.12), an "inalienable part" (art.1) of a unitary state, lacking the "very attributes of sovereignty" that might enable a federal unit or province to establish its own state immunity regime. It is "unheard of" for courts of a region within a unitary state to pronounce a divergent state immunity law.<sup>39</sup>

This reasoning places too much emphasis on one element of Hong Kong's status (it being part of a unitary state) and overlooks the broader picture, namely, the unique constitutional relationship between China and Hong Kong. The Basic Law grants Hong Kong

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*Law Review* 1, at p.7. Cf. Albert Chen, "Introduction" (Focus: the Congo Case) (2011) 41 *Hong Kong Law Journal* 369.

<sup>35</sup> *Ex Parte Republic of Peru*, 318 U.S. 578 (1943) (Supreme Court), at p.587; *Berizzi Brothers Co v Steamship Pesaro*, 271 U.S. 562 (1926) (Supreme Court); *Republic of Mexico v Hoffmann* 324 U.S. 30 (1945) (Supreme Court).

<sup>36</sup> Letter from Jack Tate, Acting Legal Adviser, US Dept. of State, to Acting US Attorney-General Philip Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984 (1952), emphasis added.

<sup>37</sup> *Alfred Dunhill of London Inc v Republic of Cuba* 425 U.S. 682 (1976) at p.703

<sup>38</sup> Decision of the NPCSC on Treatment of Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law, adopted at the 24<sup>th</sup> Session of the Standing Committee of the 8<sup>th</sup> National People's Congress on February 23, 1997 ("1997 Decision"), para.4.

<sup>39</sup> *Congo* at [267-268, 319-323]



powers that are wider than that of many federal or autonomous units in the world. Although Hong Kong may not participate in diplomatic activities in the name of a state, it has extensive powers of conducting external affairs, including powers that are normally only exercisable by a sovereign state.<sup>40</sup> It is an example of a part of a state given a “distinct international voice”.<sup>41</sup> Furthermore, there is no doubt that the fundamental philosophy of the Basic Law is to maintain separate systems and allow Hong Kong to enjoy a high degree of autonomy.<sup>42</sup> These principles are stated to be non-amendable in the Basic Law (art.159(4)), which entrenches a particular mechanism for applying national laws in Hong Kong (art.18). The NPCSC’s 1997 Decision specifically envisages that previous laws regarding foreign affairs in Hong Kong may still be applicable after the handover, provided (inter alia) that they are subject to “national laws *applied in the Hong Kong Special Administrative Region*.”<sup>43</sup>

Thus, reading the Basic Law *holistically*, bearing in mind its *underlying philosophy* and the *absence of state immunity law extended* to Hong Kong, the better view is Hong Kong is entitled to retain its previous jurisdiction to decide the law on state immunity in the absence of legislation.

Moreover, the dearth of precedents of a part of a unitary state adopting a different doctrine of state immunity is neither here nor there. After all, there is no other example in the world of a unitary state granting such an extensive degree of autonomy to its region. Rather than look for precedents elsewhere, the court should have determined whether Hong Kong can possess its own state immunity regime purely on the basis of interpreting the constitutional relationship between the two jurisdictions stipulated in the Basic Law.

The majority’s second reason for the alleged incompatibility is, if Hong Kong departed from China’s law on state immunity, the latter’s foreign relations would be prejudiced.<sup>44</sup> The majority viewed the issue of whether China would be prejudiced as a fact of state within the peculiar cognizance of the Chinese authorities, and ruled that it was bound by the latter’s affirmative answer on this issue, as expressed through their third letter to the court.<sup>45</sup>

The majority did not explain why the issue of prejudice is a fact of state. Indeed, there are serious doubts over whether a separate state immunity regime in the context of “one

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<sup>40</sup> E.g. Hong Kong can enter into treaties and join international organisations which members are usually sovereign states, e.g. the WTO. Basic Law Ch.7, art.13(3).

<sup>41</sup> J. Crawford, *The Creation of States in International Law* 2<sup>nd</sup> edn (Oxford: Clarendon Press, 2006), pp.251-252; R. Mushkat, *One Country, Two International Legal Personalities* (HK: HK University Press, 1997), pp.65-66.

<sup>42</sup> Yash Ghai, *Hong Kong’s New Constitutional Order* 2<sup>nd</sup> edn (HK: HK University Press, 2001), pp.222-224.

<sup>43</sup> 1997 Decision, para.4(1), emphasis added.

<sup>44</sup> *Congo* at [269]; 1997 Decision, para.4.

<sup>45</sup> *Congo* at [290, 361].

country, two systems” would cause such prejudice. The alleged instances of prejudice<sup>46</sup> would only occur if China and states dealing with her *expect, in the first place*, that a unified doctrine of immunity should exist. In particular, China would not be prevented from releasing assets to foreign states if she, expecting that a different doctrine of immunity may apply in Hong Kong, refrains from placing those assets in Hong Kong.<sup>47</sup> The majority erred in assuming that a divergent state immunity law would prejudice China’s foreign relations.

## Implications

The above arguments seek to show that the common law meaning of foreign affair and act of state clearly excludes the law on state immunity, and such meaning is compatible with the Basic Law, reading it from the angle of a common law court. No foreign affair or act of state was involved in the case. The minority was right in concluding that arts 13 and 19 did not come into play at all. There was no need to interpret these provisions to dispose of the case, accordingly no need to ask the NPCSC to interpret them. If the CFA had correctly applied the common law approach to interpretation, it would have found that it had jurisdiction to decide the law on state immunity in Hong Kong. Through a series of misjudgements, the majority failed to secure the maximum common law space it was entitled to in the absence of a prior interpretation issued by the NPCSC.

The majority’s ruling has implications on Hong Kong’s judicial autonomy, *despite* the NPCSC’s powers of interpretation. *Even if* the CFA had decided that it had jurisdiction to determine the doctrine of state immunity and refused to seek reference, *and* the NPCSC subsequently initiated an overriding interpretation on the court’s jurisdictional limits, such interpretation could not reverse the decision that the CFA had already given. Thus, the CFA’s ruling failed to secure the maximum boundary of autonomy at least in relation to *the case in question*.

More importantly, the majority’s expansive reasoning for concluding that state immunity is outside the court’s jurisdiction potentially reduces the jurisdictional space available to *future courts* in relation to issues *other than* state immunity. Previous case law illustrates that Hong Kong courts will confine as far as possible the binding effect of an NPCSC interpretation to the specific subject matter of the interpretation.<sup>48</sup> So future courts will limit

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<sup>46</sup> *Congo* at [211].

<sup>47</sup> I thank Tony Carty for pointing this out.

<sup>48</sup> *Director of Immigration v Chong Fung Yuen* [2001] 2 H.K.L.R.D. 533.

the impact of any NPCSC interpretation issued in relation to *Congo* to the question of whether the doctrine of state immunity is a foreign affair. As things turned out, this confining process will be facilitated by the fact that the questions for reference were phrased and answered in a confined manner. In the Interpretation, the NPCSC merely stated its *conclusion* that Hong Kong has no jurisdiction to determine the doctrine of state immunity without elaborating its reasoning.<sup>49</sup>

Contrarily, we are less certain as to how future courts would treat the majority's indiscriminate reasoning on "the nature of sovereign immunity", which, if taken seriously, would strip Hong Kong courts of jurisdiction over all issues that concern relations between states – regardless of whether the exercise of such jurisdiction is compatible with the Basic Law and whether the Chinese authorities had imposed a stance on these issues. Under the majority's logic, courts in Hong Kong would no longer be able to rule on refoulement issues if the home state pressurised China for repatriation; nor would courts be able to rule on any issue of customary international law.<sup>50</sup> Any determination made by China on these issues of law would constitute unchallengeable acts of state. Whenever such questions arise, arts 13 and/or 19 would automatically kick in and judicial reference might have to be sought. Such reasoning potentially ousts the court's jurisdiction over many matters it is entitled to adjudicate on in the absence of a prior NPCSC interpretation. If future courts construe the ratio of *Congo* broadly to encompass a definition of the excluding concepts, or if they simply continue to adopt the majority's line of reasoning in defining such concepts, their jurisdiction may be curbed in ways that go beyond the dictates of the Interpretation; China's fundamental framework for bringing about reunification, namely, high degree of autonomy and co-existence of diverse systems, would be eroded.

Undeniably, given that the majority's expansive reasoning coincided with that of the NPCSC's, as shown in the letters and the explanatory note to the Interpretation, the NPCSC may at any time issue a binding definition of the excluding concepts that reflect such reasoning. However, previous experience shows that the Chinese authorities are pragmatic and will not initiate an interpretation of the Basic Law if they do not have vested interest in the matter.<sup>51</sup> Indeed, they seemed unbothered in the past with Hong Kong courts determining

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<sup>49</sup> Some reasoning is given in the Explanatory Note to the Interpretation, which, unlike the Interpretation itself, is non-binding on courts.

<sup>50</sup> For commercial implications, see C.L.Lim, "Beijing's 'Congo' Interpretation, Commercial Implications" (2012) 128 *Law Quarterly Review* 6.

<sup>51</sup> *Director of Immigration v Chong Fung Yuen* [2001] 2 H.K.L.R.D. 533.

issues that “concern relations between states”.<sup>52</sup> The majority’s reasoning, if followed by future courts, may substantially reduce the bounded yet significant common law space that the constitutional framework has given Hong Kong’s judiciary: bounded because it is limited by the NPCSC’s theoretically unlimited powers of interpretation, yet significant because of the practical brakes on the exercise of such powers.

## **Conclusion**

Before *Congo*, we were in the dark as to how courts in Hong Kong would define foreign affair and act of state. *Congo* has replaced uncertainty with anxiety. We now know for sure that these terms cover questions of law, specifically, the law on state immunity. The judgment left hanging in the air what other issues of law would the court also consider as being outside its jurisdiction. The majority’s reasoning on “the nature of sovereign immunity” suggests that potentially all issues that concern relations between states may be so excluded, regardless of whether the exercise of such jurisdiction is consistent with the Basic Law. Whilst future courts will remain bound by the Interpretation on the doctrine of state immunity, one can only hope that they would endeavour to preserve the foundations of the unique constitutional relationship between China and Hong Kong by disregarding the majority’s overbroad reasoning, and fully exploiting the autonomous space they are entitled to in the absence of binding interpretations from China.

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<sup>52</sup> See note 4.